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In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF NATIONAL INSTITUTE OF MILITARY JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of military law. NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom is on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an amicus curiae before the United States Court of Appeals for the Armed Forces, and has appeared in this Court as an amicus in support of the Government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the Petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

NIMJ is actively involved in public education through its website, www.nimj.org, and through publications including the Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizen in the War Against Terrorism (2002) and two volumes of Military Commission Instructions Sourcebooks (2003-04). NIMJ has also sought to improve public understanding of military law by seeking release of comments on the rules governing military commissions. NIMJ is independent of the Government and relies for its programs exclusively upon voluntary private contributions.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for the parties authored this brief in whole or in part, and no person or entity other than the amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

For more than five years, hundreds of individuals, from more than forty countries, have been held in military detention by the United States at its Naval Base in Guantanamo Bay and subjected to repeated interrogations under harsh conditions. According to the most comprehensive study of the population at Guantanamo Bay,[2] 93% of the prisoners were captured by parties others than the United States and its coalition partners, at a time when the United States was paying bounties for prisoners. Fewer than half of the prisoners are accused of committing a hostile act. Many were captured far from zones of active combat in Afghanistan and Iraq, in civilian settings in places as far-flung as Bosnia and Zambia. Many are held for nothing more than staying at hotels recommended by international travel guides, fleeing from troops fighting the Taliban, or owning a rifle or a Casio watch.[3]

Petitioners here contend that they are innocent of wrongdoing, engaged neither in combat nor in acts of terrorism, and are held without just cause. They further contend that they are entitled to a meaningful hearing at which the legality of their detention can be evaluated using fair procedures and an appropriate definition of the conduct for which they may lawfully be detained as combatants.

The majority below did not reach these claims because it concluded that it lacked jurisdiction over these habeas petitions and that the Constitution did not extend to Guantanamo. 476 F.3d 981, 994 (D.C. Cir. 2007). This brief does not focus on the jurisdictional issues or the question of the Constitution's territorial scope. Rather, it focuses on two of the claims that Petitioners would have the Court consider once it holds that it has jurisdiction and reaches the merits of their habeas petitions: first, that the

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[2] Mark Denbeaux et al., *Report on Guantanamo Detainees, A Profile of 517 Detainees through Analysis of Department of Defense Data* (2006).
[3] *Id.* at 17.

procedures used by the Combatant Status Review Tribunals (CSRTs) were inadequate; and second, that there is no lawful basis for Petitioners' detention because the CSRTs used a substantive definition of "combatant" that is not supported by the law of war and thus exceeds the scope of authority granted to the President by Congress. In one of the decisions on review, Judge Green held the CSRTs facially deficient on both these grounds. 355 F. Supp. 2d 443 (D.D.C. 2005). Similarly, Judge Rogers, dissenting in the Court of Appeals, thought the CSRT procedures inadequate, 476 F.3d at 1004-06, and skeptically described the Government's definition of "combatant" as "evolving and unlimited," *id.* at 1012 n.14. These judges were correct.

NIMJ files this brief to demonstrate how the Government's treatment of the prisoners at Guantanamo represents a dramatic and unlawful deviation from traditional military law and practice, both in terms of the procedures used to classify detainees and in terms of the substantive definition of "combatant." The Government's unlawful and unauthorized actions violate the rights of these Petitioners, and would endanger U.S. military personnel and civilians by undermining the law of war. After resolving the threshold jurisdictional issues, this Court should hold that Petitioners are entitled to habeas relief based on the procedural and substantive deficiencies of the CSRTs.

ARGUMENT

I. THE LAW OF WAR PROVIDES APPLICABLE STANDARDS FOR JUDGING THE LEGALITY OF PETITIONERS' DETENTION

A. Military law guarantees fair procedures to classify detainees in accordance with the law of war

The U.S. military has traditionally used fair procedures to classify prisoners in accordance with the law of war. The Government's failure to provide such procedures for the

Guantanamo detainees is a stark departure from this tradition of compliance with the law.

Contrary to the Government's argument that Guantanamo is a "law free" zone, U.S. armed forces everywhere in the world are governed by a comprehensive legal framework for the administration of justice. The Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940, applies in peace and war, worldwide, and to American service members and people in their custody. UCMJ arts. 2(a)(1), (9) and 5, 10 U.S.C. §§ 802(a)(1), (9) and 805. These provisions reflect a legislative determination that rules of law can and do apply to persons located at, among other places, Guantanamo Bay.[4]

For over half a century, the UCMJ and implementing regulations have required compliance with the law of war, including the requirement that individuals seized in combat be afforded the protection of contemporaneous, competent and neutral tribunals to determine their status in doubtful cases in conformance with the law of war. This requirement stems from the Third Geneva Convention, which specifies that should there be any doubt "as to whether persons, having committed a belligerent act" are entitled to prisoner of war status, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[5]

This obligation is implemented in U.S. law through Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees ¶ 1-1(b) (1997) (AR 190-8). The Regulation is no mere aspiration,

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[4] UCMJ Article 2 makes the UCMJ applicable to "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States." 10 U.S.C. § 802 (a)(12); *see Rasul*, 542 U.S. at 481-82 (Guantanamo Bay is such an area.).

[5] Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

but a detailed, enforceable rule of law promulgated under the authority of the UCMJ.[6] AR 190-8 specifically states that it "implements international law," including the Geneva Conventions. The Regulation provides that, "[i]n accordance with Article 5" of the Third Geneva Convention, in case of doubt "[a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces."[7] Such tribunals are legally required to determine whether individuals in custody meet the law of war definition of civilian rather than combatant, and whether or not they are entitled to prisoner of war status. Id. ¶ 1-6(e)(10) (listing possible determinations).

The requirement that wartime detainees' status must be determined by impartial tribunals in accordance with the law of war is recognized throughout authoritative sources on military law. This requirement is incorporated in the Department of the Army's *Field Manual on the Law of Land Warfare*, FM 27-10, at ¶ 71(a) (1956) (providing for a "competent tribunal" to determine the status of belligerents) (*The Law of Land Warfare*); the Department of the Navy's Commander's *Handbook on the Law of Naval Operations* § 11-7 (1995) (even "individuals captured as spies or illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated"); and the Army Judge Advocate General's

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[6] This Regulation was issued pursuant to 10 U.S.C. § 121, which authorizes the President to "prescribe regulations to carry out his functions, powers, and duties under this title." Duly enacted regulations like AR 190-8 constitute U.S. law. *Gratiot v. United States*, 45 U.S. (4 How.) 80, 117 (1846) ("As to the army regulations, this court has too repeatedly said, that they have the force of law . . . .").

[7] This identical regulation has been also adopted in the Navy (OPNAVINST 3461.6), Air Force (AF JI 31-304), and Marine Corps (MCO 3461.1.).

School's *Operational Law Handbook* 26 (2004) (directing judge advocates to "advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the [Third Geneva Convention], at least until their status may be determined") (*Army Operational Law Handbook*).

In the United States military's Area of Operations (AOR) that includes Afghanistan and Iraq, these provisions are further implemented by United States Central Command (CENTCOM) Regulation 27-13 (1995), which provides that U.S. personnel "who take or have custody of a detainee will: . . . (2) Apply the protections of the [Third Geneva Convention] to each [Enemy Prisoner of War] and to each detainee whose status has not yet been determined by a Tribunal covered under this regulation." This regulation applies to "all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR." Id. ¶ 2. Personnel who fail to treat any detainee in accordance with the Geneva Conventions "may be subject to punishment under the UCMJ." Id. ¶ 7(b).

The military's otherwise consistent record of compliance with these laws belies the Government's argument in these cases that legal process is incompatible with war. The U.S. Military Assistance Command in Vietnam, for example, enforced strict requirements for the classification of captured personnel, including providing impartial tribunals to determine eligibility for prisoner-of-war status. Directive No. 381-46, Annex A (Dec. 27, 1967), and Directive No. 20-5 (Sept. 21, 1966, as amended Mar. 15, 1968); *see also* Frederic L. Borch, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 29 (2001).

During Operation Desert Storm, the United States processed 69,822 Iraqi troops pursuant to AR 190-8. Borch, *supra*, at 22. The International Red Cross accordingly

reported that the United States complied with the Geneva Conventions more fully than any other nation in any previous conflict. *Id.* Similarly, in Panama in 1989-90, the United States provided tribunals to adjudicate the status of 4100 captured troops, promptly releasing 4000 and granting POW status to the remaining 100. *Id.* at 104-06. More recently, U.S. forces have also provided impartial tribunals compliant with Article 5 to adjudicate the status of captured belligerents in the current conflict in Iraq, a theater of active combat. Dep't of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003).

The Government's failure to provide the Guantanamo detainees with AR 190-8 hearings immediately after their capture is a dramatic break from decades of consistent military practice of compliance with the law. Since the United States has provided AR 190-8 tribunals in the war theaters of Vietnam, Panama, Iraq, and elsewhere, it is difficult to credit the argument that such tribunals at Guantanamo Bay, or litigation in the District of Columbia courts, would interfere with field commanders. Unlike the past tribunals that operated under fire, tribunals in Guantanamo Bay, or courts in the continental United States, would not be held in war zones. The Government offers no credible argument that tribunals required by military regulations and by the 194 nations subscribing to the Geneva Conventions would interfere with its war powers. The rules and practice of United States military forces establish that the involvement of competent tribunals in determining the status and rights of detained combatants is a regular component of military operations, and essential to ensuring compliance with the law of war.

There is simply no provision in any law, domestic or international, that permits the President to issue a blanket pronouncement that a military detention facility is outside

the law or that all individuals falling into the control of the United States in a particular theater of war are outlaws.

These protections may not be circumvented by a claim that detained personnel are not entitled to status as enemy prisoners of war. The Regulations implementing the Geneva Conventions provide a comprehensive framework for the treatment of persons caught up in armed conflict. By their explicit terms, *every* detainee whose status has not been determined by an impartial tribunal is entitled to their protection.

Having undertaken to adhere to these legal obligations, our military services and commander-in-chief are not free to disregard them. *Service v. Dulles*, 354 U.S. 363 (1957). The protections afforded by impartial tribunals are not voluntary or idiosyncratic efforts of field commanders, or applicable only to some detainees, but are the product of United States law, regulations, and orders protecting all classes of detainees.

B. This Court has traditionally used the law of war to inform its interpretation of statutes related to armed conflict and the scope of executive war powers

American compliance with the law of war has also been ensured by this Court's practice of looking to the law of war to inform the meaning of statutory provisions related to armed conflict, as well as the scope of inherent executive power. Based on these precedents, this Court should again be guided by the law of war in determining whether there is legal authority for the continued detention of Petitioners at Guantanamo.[8]

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[8] Reliance on the customary law of war (as reflected in the Geneva Conventions, among other sources) as a guide for interpretation of the scope of authorized government powers is analytically distinguishable from invoking the Geneva Conventions as a "source of rights" as described in section 5 of the Military Commissions Act of 2006 (MCA). When Congress does not intend its enactments to be read in light of international law, it says so explicitly, as it did in section

The Court relied on the law of war most recently in interpreting Article 21 of the UCMJ in *Hamdan*. Two years earlier, the plurality similarly relied on the law of war in interpreting the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) in *Hamdi*, 542 U.S. at 520-21; *id* at 550 (op. of Souter, J.). The plurality in *Hamdi* also indicated that the law of war could be relevant as one possible benchmark for evaluating whether particular procedures for classifying wartime detainees satisfy the constitutional requisites of due process. 542 U.S. at 538 (referring to AR 190-8 in discussing the "possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal") (plurality op.); *id.* at 550 (op. of Souter, J.) (finding the detention of Petitioner unauthorized because of the Government's failure to comply with AR 190-8 and art. 5 of the Third Geneva Convention).

These decisions are only the latest in a long line of cases throughout American history that rely on the international law of war as a guide to the scope of government powers in armed conflict. *See Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (the Court has "recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals"); *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863) (looking to international law of war to determine legality of wartime seizures by executive); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (noting that the President "cannot lawfully transcend the

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6(a)(2) of the MCA regarding the interpretation of the War Crimes Act, 18 U.S.C. § 2441(d). Thus, regardless of the meaning or proper application of these provisions of the MCA, reliance on the law of war as a guide for interpretation of authorized powers is as appropriate in this case as in other cases throughout American history.

rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorized proceedings which the civilized world repudiates and disclaims," in dissent from a majority opinion that restricted presidential war powers even further to measures explicitly authorized by Congress); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) ("congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed"); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) ("If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.").

Against this historic backdrop of compliance with the law of war, Congress would need to be exceptionally clear if it intended to empower the President to detain people in a manner not authorized by the law of war. Far from indicating an intent to authorize such deviation, however, Congress here authorized the President to use "necessary and appropriate force." AUMF § 2(a).

As the plurality of this Court concluded in *Hamdi*, the AUMF's reference to "necessary" and "appropriate" military force should be interpreted in light of "longstanding law-of-war principles," 542 U.S. at 521, to encompass only "fundamental and accepted" military detention practices that are by "'universal agreement and practice'" part of the lawful waging of war, *id.* at 518; *see id.* at 549 (op. of Souter, J.) (rejecting government's "claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution.").

II. PETITIONERS' DETENTION IS NOT AUTHORIZED BY THE LAW OF WAR

As the above sections indicate, the requirements of the law of war are relevant both because of the binding military

rules and regulations that implement them and because this Court has traditionally relied on the law of war in interpreting the lawful scope of government powers in armed conflict. The continued detention of Petitioners at Guantanamo is unauthorized and illegal because the Government has deviated from both the procedural and substantive requirements of the law of war.

Petitioners are entitled to habeas relief on at least two grounds: first, the CSRTs employed procedures that are legally inadequate; and second, the CSRTs classified prisoners based on a substantive definition of "combatant" for which there is no authority. As the court below correctly concluded, because Petitioners' detention is not consistent with the law of war, it cannot be part of the "necessary and appropriate" force that Congress has authorized the President to use in fighting terrorism. 355 F. Supp. 2d at 475.

A. The procedures used by the CSRTs do not comport with the law of war

In accordance with the binding regulations described above, the U.S. military has traditionally used the procedures of AR 190-8 to classify prisoners in accordance with the law of war. None of the Petitioners received the hearings required by AR 190-8 immediately following their detention, and this fact alone renders their detention in violation of the law.

Moreover, the Government's attempt in the courts below to characterize the CSRT proceedings as comparable to those required by AR 190-8 misses the point that, at this late date, several years and half a world away from the place of capture, such minimal process is unacceptable. As this Court's decision in *Hamdi* made clear, "initial captures on the battlefield [where AR 190-8 hearings pursuant to Article 5 are held] need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have

been seized." 542 U.S. at 534 (emphasis added). Whereas battlefield needs may require a more summary proceeding, the defects in the CSRTs had no such justification. Petitioners here were far from a combat zone, and had been regularly interrogated for years, allowing the Government ample time to develop its evidence. The resulting proceedings ought to have been more robust if they were to remedy the lack of contemporaneous AR 190-8 hearings; instead they were less so.

The CSRTs did not provide even the minimum safeguards of an AR 190-8 proceeding. AR 190-8 hearings are based on evidence secured in compliance with the Geneva Conventions, which prohibit torture and coercion;[9] the CSRTs are not.[10] AR 190-8 hearings are conducted contemporaneously and near the place of capture, where witnesses are available; the CSRTs were conducted years later and thousands of miles from the battlefield. AR 190-8 hearings presume prisoners to be entitled to POW protections until proven otherwise (at ¶ 1-6(a)); the order creating the CSRTs begins with a recitation that the detainees subject to the CSRTs have already been determined to be enemy combatants,[11] requires the detainees to prove otherwise without access to witnesses

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[9] AR 190-8, ¶ 2-1a(1)(d) ("[t]he use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited"); Third Geneva Convention arts. 3(1)(a), 17.

[10] Sec'y of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba* § G(7) (July 29, 2004) (*CSRT Memorandum*) (allowing use of "any information it deems relevant and helpful"); *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472-73 (discussing allegations of CSRT use of statements obtained through torture or coercion).

[11] Deputy Sec'y of Defense, *Order Establishing Combatant Status Review Tribunal* § a (July 7, 2004) (*CSRT Order*)

and without being informed of the identity of accusers,[12] and in any event cannot grant detainees POW status.[13]

The failure of the CSRTs to meet even the basic requirements of AR 190-8 – let alone provide the additional protections necessary as a matter of due process to justify detention after so many years – is indicative of the degree to which they are inconsistent with the traditional law of war. The CSRTs are unauthorized because their deviation from the procedures required by the law of war takes them outside of Congress's authorization of "necessary and appropriate" force. Their departure from the law of war is also relevant to the issue of whether they satisfy the Due Process Clause. *Cf. Hamdi*, 542 U.S. at 538. While compliance with the law of war is not alone enough to satisfy constitutional standards of due process, *cf. id.* at 575 n.5 (Scalia, J., dissenting), failure to comply with even the most minimal law of war standards for battlefield tribunals certainly belies the argument that a given procedure constitutes due process.

Any neutral observer asked to describe the features of a civilized system of justice would be hard-pressed to identify anything more basic than the right to be informed of the basis for detention; the right to be confronted with evidence; and the rights to challenge that evidence and have assistance in doing so. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). As this Court made clear in *Hamdi*, "These essential constitutional promises may not be eroded." 542 U.S. at 533. Petitioners here have been denied these most basic rights.

In one of the decisions below, Judge Green – the only district judge to have reviewed the CSRTs in depth – found that they were woefully insufficient. She held that the

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[12] *CSRT Memorandum* §§ G(11), F(8), G(9).

[13] *CSRT Memorandum*, Encl. 9, Combatant Status Review Tribunal Decision Report Cover Sheet) ("The Tribunal has determined that he (is)(is not) an enemy combatant as defined in [*CSRT Order*]").

detainees had stated a valid claim that the CSRTs violated the Due Process Clause because in all cases detainees were (1) not provided with adequate notice of the bases for their detention; (2) forbidden access to material evidence upon which the CSRTs determined their status; (3) not given a fair opportunity to rebut the evidence upon which their status was determined; and (4) not provided with meaningful assistance to oppose the claims against them. 355 F. Supp. 2d at 468-72. In addition, the district court concluded that, in at least some of the cases, the CSRTs were alleged to have relied on evidence that was obtained by interrogations so severe as to amount to torture or impermissible coercion. Judge Rogers, who dissented from the jurisdictional ruling of the Court of Appeals, reached a similar conclusion. 476 F.3d at 1004-06.

B. The CSRTs used a definition of "combatant" that is inconsistent with the law of war

Judge Green also properly concluded below that the CSRTs were legally deficient because they employed a vague and overly broad definition of "enemy combatant." 355 F. Supp. 2d at 474-76.

In *Hamdi*, this Court recognized that the "necessary and appropriate force" authorized by Congress in the AUMF encompassed the detention of the "limited category" of persons who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516, 518 (plurality op.) (emphasis added). As the Court explained, such detentions were supported by "longstanding law-of-war principles." *Id.* at 521.

As Judge Green found, "[t]he definition of 'enemy combatant' in the Order creating the CSRTs is significantly broader than the definition considered in *Hamdi*." 355 F. Supp. 2d at 475. The CSRT Order defines "enemy combatant" to be "an individual who was part of *or*

supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States and its coalition partners." CSRT Order § a (emphasis added). The Order specifies that this "includes" any person who has "committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.* But it does not require that a person detained as a combatant have committed a belligerent act, directly supported hostilities, or otherwise "engaged in an armed conflict against the United States," as required by *Hamdi*. To the contrary, merely "supporting" the Taliban, al Qaeda, or associated forces is sufficient to subject one to indefinite military detention under the CSRT Order definition. *Id.*

At the hearing in the district court, the Government's attorney demonstrated the breadth of the CSRT definition in response to a series of hypotheticals. The Government argued that a variety of persons who did not participate directly in hostilities could be detained as combatants, including: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," "a person who teaches English to the son of an al Qaeda member," and a "journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source." 355 F. Supp. 2d at 475.

The law of war classifies all these individuals as civilians, not combatants. Congress's authorization of "necessary and appropriate" force cannot properly be read to encompass the classification and detention of individuals under the definition used by the CSRTs.

1. The law of war distinguishes between "combatants" and "civilians"

The Geneva Conventions, and especially Additional Protocol I, prescribe with considerable detail the rights and

duties of people caught up in armed conflict.[14] Additional Protocol I states that "combatants," who are "members of the armed forces of a Party to a conflict," art. 43(2), are lawful military targets, while non-combatants are not.[15] This deliberately limits the class of people who lawfully may be targeted by opposing military forces. People who are actually in the armed forces of a nation-state are deemed combatants and are generally lawful targets at all times; people who are not in the armed forces are generally not combatants and are generally not lawful targets.

Because the law of war provides a comprehensive scheme for people caught up in warfare, there is no intermediate status. Individuals must be classified either as combatants or civilians: "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention . . . . There is no intermediate status; nobody in enemy hands can be outside the law." Int'l Comm. of the Red Cross, *Commentary to the IV Geneva Convention 51* (Jean S. Pictet ed. 1958); *see also Army Operational Law*

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[14] Although the United States has not ratified Additional Protocol I, it has acknowledged that much of the treaty reflects binding customary international law. *Army Operational Law Handbook* at 11; Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987).

[15] Additional Protocol I further defines combatants to include: "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a Government or an authority not recognized by an adverse Party." Additional Protocol I art. 43(1). Members of disorganized militia groups who are not under a command responsible to a state Party to the conflict are not combatants under this definition. Conversely, civilians are defined as persons who do not fall into one of the categories of persons entitled to prisoner of war status pursuant to article 4 of the Third Geneva Convention and article 43 of Additional Protocol I. *See* Additional Protocol I art. 50.

Handbook 142 ("Anyone not qualifying as a combatant, in the sense that they are entitled to [prisoner of war] status upon capture, should be regarded as a civilian."); *The Law of Land Warfare* ¶ 73.

The law of war recognizes that civilians may cause harm in armed conflict. They may be treated as targets of force and, inferentially, as combatants, but only "for such time as they take a direct part in hostilities."[16] The law of war standard, therefore, for when people who are not ordinarily defined as combatants may be treated as combatants is when they take a "direct part" in "hostilities."

This standard contains three relevant criteria. First, it applies only to "hostilities." This word has a narrower connotation than the phrase "armed conflict," which appears frequently elsewhere in the Geneva Conventions.[17] Thus, an individual who would not ordinarily be considered a combatant must participate in actual "hostilities" – rather than the relevant armed conflict more generally – to lose protection as a civilian. The standard also has a clear temporal dimension. It lasts only "for such time" as the individual takes a direct part in hostilities. A civilian who takes part in hostilities regains his civilian status after his direct participation has ceased (although he may be criminally prosecuted for his illegal participation in hostilities).[18] Finally, the test sets up a demanding nexus. The individual must take a "direct" part. While this phrase is not further defined, it clearly provides that indirect aid—no matter how valuable—does not suffice.

A civilian does not become a combatant because he generally "supports" troops. Nor does he become a

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[16] Additional Protocol I, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); Additional Protocol II, art. 13 (same).

[17] *See, e.g.*, Third Geneva Convention, art. 2.

[18] *See Public Comm. Against Torture v. Israel*, 46 I.L.M. 375, 393 (Isr. Supr. Ct. 2007).

combatant because an opposing commander suspects he might, at some point in the future, plot to engage in violent acts.[19] If the rule were otherwise, large parts of the civilian population of a country at war would become lawful targets for attack. Shooting a gun on a battlefield constitutes taking a "direct part in hostilities." So, too, would hijacking an airplane with the intent to use it as missile. Driving a truck full of explosives or carrying a gun towards the battlefield with the imminent intent to engage in combat could also amount to taking a direct part in hostilities. *See Public Comm. Against Torture v. Israel*, 46 I.L.M. at 391. By contrast, supporting the enemy cause off the battlefield, conspiring with the enemy, contemplating taking part in battle in the future, and sympathizing with the enemy do not constitute taking a direct part in hostilities under the law of war, although those acts may be punishable under domestic criminal law.[20]

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[19] *See* Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 619 (Claude Pilloud et al. eds. 1987) (*Commentary to Protocols*) (noting that there is "a clear distinction between direct participation in hostilities and participation in the war effort," to avoid endangering large parts of the civilian population).

[20] *Public Comm. Against Torture v. Israel*, 46 I.L.M. at 392 (direct participation does not include someone who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid."); Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM U. J. INT'L. L. & POL'Y 49, 70 (1993) ("[A] civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation . . . would also include acting as a member of a weapons crew or providing target information for weapons systems 'intended for *immediate use against the enemy*, such as artillery spotters or members of ground observer teams.'"); *Commentary to Protocols* at 516 ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity

A civilian who participates directly in hostilities would in some circumstances be violating the law of war, and in the Government's nomenclature would presumably be labeled an "unlawful combatant."[21] "Illegal combatant" or "unlawful combatant" is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for merely engaging in combat. As used by these commentators, the phrase "unlawful combatants" actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status) and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with).

As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all under the law of war: they are more accurately described as "unprivileged belligerents." George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002).

Members of the Taliban armed forces would properly be considered combatants in the conflict in Afghanistan. Similarly, members of groups associated with the Taliban,

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takes place."); L.C. Green, THE CONTEMPORARY LAW OF ARMED CONFLICT 107 (2d ed. 2000).

[21] A civilian who directly participated in hostilities could be treated as a combatant only in the sense that he would become a lawful target of attack for the duration of his direct participation; in all other senses he would remain a civilian protected by the Fourth Geneva Convention. Fourth Geneva Convention art. 4; *The Law of Land Warfare* ¶ 73. The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person, provided that procedural safeguards were observed. Arts. 42, 43, 78; Additional Protocol I art. 75(4).

such as al Qaeda, who fought on the battlefield in Afghanistan and who served under a command responsible to Taliban officials, could also be classified as combatants in that conflict. In addition, other individuals who fought on the battlefield could be treated as combatants during their actual participation in the fighting.

At the same time, persons who are not alleged to be members of a regular armed force of a nation state, nor to have participated directly in hostilities, cannot be categorized as combatants—lawful or unlawful. For many of the prisoners at Guantanamo, including a number of the Petitioners in this case, the Government does not claim that they participated directly in hostilities in Afghanistan or Iraq.[22] Nor are many of these detainees alleged to be

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[22] As this Court recognized in *Hamdan*, the bulk of the 1949 Geneva Conventions and Additional Protocol I apply only in armed conflicts between state parties to the Conventions. A more limited body of law applies to armed conflicts "not of an international character," 126 S. Ct. at 2795-96, and thus is potentially applicable to those detainees not connected to international armed conflict in Iraq or Afghanistan. Like the law applicable to international armed conflict, the rules for non-international armed conflict distinguish between combatants and civilians. Civilians may not be targets of attack "unless and for such time as they take a direct part in hostilities." Additional Protocol II, art. 13. Thus, as in international armed conflict, those taking no direct part in hostilities cannot lawfully be classified as combatants. Furthermore, and in contrast to the law applicable in international armed conflict, the law of war applicable in non-international armed conflict arguably provides no independent authority for detaining either combatants or civilians. *al-Marri v. Wright*, 487 F.3d 160, 184-186 (4th Cir. 2007); John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extra-Territorial Context*, 40 ISR. L. REV. (forthcoming 2007) ("while the law of inter-state armed conflict authorizes the conflicting states to detain enemy combatants for the duration of hostilities, no analogous provision exists in the law of non-international armed conflict."); Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 210-11 (2004); Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L

members of "organized armed forces, groups and units which are under a command responsible to [the Taliban Government or the Government of Iraq] for the conduct or its subordinates."

Regardless of the facts of each Petitioner's case, the fundamental problem is that the CSRTs employed a definition of "combatant" that is overly broad, and so it is impossible to determine based on their findings which individuals have been properly detained. The CSRT definition encompasses many individuals who are not members of the armed forces of a nation-state, who did not participate directly in hostilities, and who never committed any belligerent act. Such individuals are civilians under the law of war. They may be arrested and punished under other laws, but they do not fall within Congress's authorization for "necessary and appropriate" military force.[23]

REV. RED CROSS 45, 47 (2003). While the law of war does not prohibit the detention of either combatants or civilians in non-international armed conflict, authority for such detentions cannot be derived directly from the law of war and must be explicitly authorized by and consistent with domestic legal and constitutional standards, and international human rights law.

[23] To the extent that some detainees at Guantanamo are unconnected with aspects of the "war on terror" that qualify as armed conflict, the law of war provides no authority whatsoever for their detention as "combatants." Not all terrorist actions rise to the level of armed conflict. Indeed, terrorist actions by private groups have not customarily been viewed as creating armed conflicts. Hilaire McCoubrey & Nigel D. White, INTERNATIONAL LAW AND ARMED CONFLICT 318 (1992). For example, as the United Kingdom stated when it ratified Additional Protocol I: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." Reservations by the United Kingdom to Art. 1, para. 4 & art. 96, para. 3 of Additional Protocol I Key aspects of some parts of the "war on terrorism" diverge from traditional

2. *This Court's decisions have rested upon a narrow definition of "combatant" that is consistent with the law of war*

This Court's previous decisions have hewed closely to the traditional definition of "combatant" under the law of war as described above. Yaser Hamdi, for example, was alleged to have participated directly in hostilities at the time of his capture. Northern Alliance forces were "engaged in battle" with the Taliban when Hamdi's Taliban unit surrendered. Hamdi himself was allegedly carrying a Kalashnikov assault rifle at the time of his surrender. In its decision, the Court repeatedly emphasized Hamdi's direct participation in hostilities on a foreign battlefield. 542 U.S. at 522 n.1 ("the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield"); *id.* at 523 (referring to the "context of this case: a United States citizen captured in a foreign combat zone") (emphasis omitted); 542 U.S. at 517 (decision addresses only the "narrow question" of whether the Government had authority to detain as "enemy combatants" individuals who were "part of or supporting forces hostile to the United States or coalition partners" in

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assumptions of the law of war. For example, the "war on terrorism" does not have clear geographic parameters. Furthermore, the law of armed conflict anticipates that armed conflict will, at some point, end, and regulates the return from a state of war to normal life. Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). As defined by the Government, however, the "war on terror" will not end until al Qaeda (an ill-defined and amorphous group) and its "associated forces" or supporters (also undefined), anywhere in the world are eradicated. *See, e.g.*, President Bush's Address to a Joint Session of Congress and the American People (Sept. 20, 2001) ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.").

Afghanistan and who "engaged in an armed conflict against the United States" there.).

In addition to participating directly in hostilities at the time of his capture, Hamdi was also specifically alleged to be affiliated with a Taliban government militia unit, 542 U.S. at 513, and therefore to be a part of the "organized armed forces, groups and units which are under a command responsible to [a] Party for the conduct of its subordinates." Additional Protocol I, art. 43(2). The defendants in *Ex parte Quirin*, also had the "status of an enemy belligerent" when they entered the United States, *id.* at 38, having worn uniforms of the German Marine Infantry when they came ashore from German military submarines, *id.* at 21.

By contrast, the Court held that the prisoner in *Ex Parte Milligan* was not a combatant. Milligan was accused of "joining and aiding" a "secret society" for the "purpose of overthrowing the Government," "holding communication with the enemy," "conspiring to seize munitions of war stored in the arsenals," and "to liberate prisoners of war" in Indiana at a time when it "was constantly threatened to be invaded by the enemy." 71 U.S. at 6-7. Nevertheless, Milligan was entitled to a civilian criminal trial. As the Court explained:

> If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the Government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Id. at 131. As the Court emphasized in *Hamdi*, the key distinction was Milligan's lack of direct participation in hostilities: "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against

Union troops on a Confederate battlefield, the holding of the Court might well have been different." 542 U.S. at 522.

In short, as the Court indicated in *Hamdi*, it has upheld the detention of enemy combatants only when "based on longstanding law-of-war principles." The Court has warned that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." 542 U.S. at 521. The Government's attempted extension of the term combatant through the overbroad CSRT definition is exactly the unraveling the Court foresaw.

III. THE GOVERNMENT'S DEPARTURE FROM THE LAW OF WAR ENDANGERS AMERICAN SOLDIERS AND CIVILIANS

A. The CSRTs' broad redefinition of the term "combatant" erodes the most fundamental distinction in the law of war

The principle of distinction, which requires distinguishing between combatants and civilians, is the most fundamental principle of the law of war. As the official commentary to the additional protocols of the Geneva Convention observes, "the principle of protection and distinction forms the basis of the entire regulation of war." Int'l Comm. of the Red Cross, *Commentary to Protocols* 586; HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65 (Dieter Fleck ed. 1995); *Quirin*, 317 U.S. at 30-31 (noting that "[b]y universal agreement and practice," the law of war draws a distinction between "the armed forces" and civilian populations); INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Lieber Code) art. 22 (1863).

The concept of combatant determines who may be the lawful target of military attack. Combatants may be intentionally shot, bombed, or otherwise targeted with lethal force. *See* Additional Protocol I art. 48; Additional

Protocol II art. 52(2). Civilians are protected from being the intentional targets of armed attack, as long as they do not participate directly in hostilities. *See* Additional Protocol I art. 51(2); Additional Protocol II art. 13(2). "The principle of distinction is sometimes referred to as the "grandfather of all principles," as it forms the foundation for much of the Geneva tradition of the law of war. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property." *Army Operational Law Handbook* 166.

Within certain limits, combatants may be attacked with lethal force wherever they are found.[24] Thus, if all persons alleged to "support" al Qaeda or associate groups truly were "combatants," the law of war would not only allow them to be held until the end of active hostilities, but in many circumstances would allow them to be shot upon discovery, at any point, anywhere in the world.[25]

Military officers, statesmen, judges, and scholars have long recognized that any blurring between the categories of combatant and non-combatant could lead to a severe breakdown in limits on whom military forces may legitimately target. *See* Geoffrey Best, WAR AND LAW SINCE 1945, at 254-66 (1994). In many wars, virtually every member of society – from farmers and factory workers to government bureaucrats – may provide direct or

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[24] While it is forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer the means of defense, has surrendered at discretion," Hague Convention [IV] Respecting the Laws and Customs of War on Land art. 23(c), the law of war authorizes attacks on "individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." *The Law of Land Warfare* ¶ 31. Attacks on combatants must also be proportional and necessary to military objectives.

[25] Moreover, the Government might also be allowed to inflict collateral damage on bystanders. Fourth Geneva Convention art. 53; Additional Protocol I art. 52.

indirect support to the nation's military. Designating as combatants people who provide indirect support to a party engaged in armed conflict but who do not directly participate in hostilities would threaten to legitimize the wholesale targeting of civilian populations. *See* Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Harvard Program on Humanitarian Policy and Conflict Research, 8-11 (Winter 2005). Moreover, maintaining a clear legal separation between combatants and non-combatants reinforces the separation of military and civilian functions and control. "Th[e] supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations." *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946) (Murphy, J., concurring). Expanding the definition of "combatant" of necessity increases the scope of military authority over civil socie . Nations that adopt sweepingly overbroad definitions of "combatant," such as the one proffered by the Government in this case, run the risk of thrusting upon the military the roles of judge and jailer to a degree far exceeding military necessity.

Indeed, one of the most chilling aspects of the attacks of September 11, 2001 was the attackers' intentional targeting of civilians, a fundamental violation of the law of war. Some terrorist rhetoric refuses to acknowledge the distinction between civilians and combatants – labeling all U.S. and Israeli citizens, for example, the "enemy." This verbal sleight of hand renders the law of war useless, because it justifies the killing of any individual. It is precisely to protect against such abuses that the law of war defines "combatants" narrowly.

The CSRTs' definition of combatant renders the distinction between civilian and combatant illusory. This Court should, instead, employ the definition of "combatant" contained in the law of war in interpreting Congress's authorization of "necessary and appropriate" force.

B. The CSRTs' broad redefinition of the term "combatant" erodes fundamental liberties

Accepting the CSRTs' redefinition of the term "enemy combatant" would also erode fundamental liberties by extending the law of war far beyond its traditional domain. The law of war allows the Government extraordinary powers to deprive individuals of life, liberty and property with relatively minimal process. These extraordinary powers are justified both by battlefield exigency and by their limited temporal and geographic scope. If the Government's position in this case is accepted, it would extend those extraordinary powers without any of these limits.

The Government's own statements in litigation reveal how the breadth of its redefinition of the term "combatant" would encompass the "little old lady in Switzerland," the English teacher, and the journalist. 355 F. Supp. 2d at 475. The consequences of designation as an "enemy combatant" are severe, since such individuals will not be granted the due process of a criminal trial that those who are criminally accused of providing "material support" to terrorism are given. *See* 18 U.S.C. § 2339A-2339D. The breadth of the definition of enemy combatant is thus particularly troubling in light of the minimal process that individuals so classified are likely to receive before being indefinitely deprived of their liberty – or even their lives.

Moreover, such a broad expansion of the category of persons who can be treated as "combatants" could potentially affect U.S. citizens and persons in the United States as well as aliens overseas. *See Hamdi*, 542 U.S. at

520 ("a citizen, no less than an alien" can be subject to military detention and trial); *Ex parte Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."). While the differences between persons arrested in the United States and those seized abroad are of potential constitutional significance, this Court should be extremely wary of the possible domestic consequences of endorsing the Government's novel redefinition of the term "combatant."

B. The Government's disregard for the law endangers American soldiers and personnel

Compliance with the law of war is necessary to protect the safety and welfare of American soldiers and civilians. As Secretary of State Dulles testified during the Senate's consideration of the Geneva Conventions, America's "participation is needed to . . . enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong. 1st Sess. 3-4 (1955). Senator Alexander Smith added, "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States." 101 Cong. Rec. 9962 (1955).

Time and again, the United States' adherence to the Conventions and their precursors has saved American lives. In World War II, for example, "The American Red Cross attributed . . . the survival of 99 percent of the American prisoners of war held by Germany . . . to compliance with the [1929] Convention." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 10 n.44 (1977). The fact that millions of POWs from all camps returned home was "due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The*

Chaotic Status of the Laws of War and the Urgent Need for Their Revision, 45 AM. J. INT'L L. 37, 45 (1951).

To safeguard its own troops, the United States has been steadfast in applying the Geneva Conventions even to combatants whose governments insisted the Conventions did not bind them. Thousands of American soldiers taken prisoner during the Vietnam War benefited from the United States' commitment to afford all enemy POWs the protections of the Conventions to secure "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-73, at 63 (1975). The United States provided those protections not only to North Vietnamese soldiers but also to the Viet Cong, who did not subscribe to the laws of war. *Id.*

The Executive Branch has emphatically demanded – and rightly so – that these protections be accorded to Americans captured or detained overseas, and has joined in condemnations of behavior that violates them. U.N.S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N.Doc. S/RES/674 (1990). The Defense Department took pains to "remind the Iraqis . . . [t]hat there are very clear obligations under the Geneva Convention to treat prisoners humanely." Statement of Deputy Secretary of Defense Paul Wolfowitz, Mar. 23, 2003, Interview with New England Channel News (Mar. 23, 2003). In objecting to the televised display of captured American soldiers, President Bush stated his insistence that prisoners be afforded the protections of international law. President George W. Bush, Remarks (Mar. 23, 2003).

The Legal Adviser to the Department of State commented on the consequences to American forces that would arise from a departure from these rules, "[a]ny small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into

combat." William H. Taft IV, Legal Adviser, Dep't of State, Memorandum to Counsel to the President (Feb. 2, 2002).

Denying Guantanamo detainees the protections of the law of war is a departure from past practice that weakens the United States' ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad.

The lives of American military and civilian personnel are endangered by the United States' failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.

CONCLUSION

The Government's position in this case is inconsistent with decades of sound military law and policy. If endorsed by this Court, it will do considerable violence to that vital body of law that protects soldiers, civilians, and all those caught up in war. After resolving the threshold jurisdictional issues, this Court should hold that Petitioners are entitled to habeas relief because the CSRTs used inadequate procedures and an unauthorized definition of "combatant" not supported by the law of war.

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Respectfully submitted.

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